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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, *et al.*,
Petitioners,

v.

ROBERT W. KELLEY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari
To The United States Court of Appeals
For the Sixth Circuit

REPLY BRIEF

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The issues herein concern the proper interpretation of this Court's decisions in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1 (1971) and *Pasadena City Board of Education* v. *Spangler,* 427 U. S. 424 (1976) and, more broadly, the ability of district courts across the nation to respond to the need to modify decade-old desegregation decrees in light of changing conditions. The Sixth Circuit improperly rejected pupil assignment portions of the 1981 plan approved by the District Court and required that new school attendance zones be drawn to approximate the current racial population of the County despite the fact that a school desegregation plan has

been in place for ten years. Although full argument on the merits of these questions is properly reserved for briefing on the merits, we take this opportunity to reply to the Respondents' Brief in Opposition:

1. The District Court stated in 1981 that "[t]he good faith efforts of this [School] Board to achieve desegregation have been amply demonstrated." A. 153. Nonetheless, the Respondents contend that the School Board has engaged in continuing constitutional violations since the implementation of the 1971 plan. Brief in Opposition ("Br. Opp.") 31. Yet the Respondents can refer to no explicit holding of a lower court to support their assertion because, quite simply, there is none. The Respondents rely solely on scattered phrases culled from the lower court opinions that fail to support their assertion.

Respondents first quote from the District Court order of August 17, 1972, in which the District Court criticized the School Board's first year of implementation of the 1971 plan and ordered it to take certain additional actions, including the purchase of school buses. Br. Opp. 21. As we explained in our Petition for Certiorari ("Pet.") 10 n. 5, the District Court has never, since the 1972 order was put into effect, held that the School Board has obstructed the system-wide implementation of the 1971 plan. Actions now a decade old, which were rectified when the 1971 plan was fully implemented, cannot now support the Sixth Circuit's requirement that each school district be redrawn to reflect the current racial makeup of the school system.

Respondents also rely on the conclusion of the District Court that the implementation of the 1971 plan constituted *de jure* segregation because it encouraged population shifts to parts of the County not included within the desegregation remedy. It is clear, however, that the District court was referring to its own actions as *de jure*. The District Court said that "[t]he perimeter

line drawn by the Court in 1971. . . has encouraged white flight to the suburbs and to those school zones unaffected by the 1971 order . . . . The resegregation, resulting, at least in part, from the nonetheless good faith efforts of the School Board in the implementation of the Court's order, amounts to a *de jure* segregation." A. 44-45. As the District Judge further explained in open court, "it appears to me that the previous Court action . . . has contributed to resegregation . . . and to the extent it has, this Court is of the opinion — I don't know whether there is any case law to support it — but that is *de jure* action rather than *de facto* action." Pet. 10 n. 5. The finding of "*de jure*" segregation relied upon by the Respondents thus does not reflect upon the actions of the School Board.[1]

The Respondents note that the District Court stated in 1979 that the School Board's administration of an optional transfer program as it affected one largely black high school conflicted with the "spirit" of the 1971 plan, A. 56-57, and that this observation was repeated by the Court of Appeals, A. 5. Yet the District Court simultaneously refused to hold the School Board in contempt of court because the Board had not been given adequate notice that its actions might conflict with the District Court's orders. A. 56. Indeed, the District Court concluded that

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[1] Respondents also mischaracterize the District Court's comments concerning the accommodation of white flight in the suburban areas through new construction. Br. Opp. 11 n. 9. The reference by the Court to accommodation was not an indictment of the School Board's actions — indeed, no construction in the areas excluded by the 1971 order had been undertaken. Rather, the Court was questioning the feasibility of bringing young students from those excluded areas to the innercity, routes the Court had rejected in 1971 because of "practical considerations, common sense, and judgment." A. 169. The District Court's ultimate answer to this question was incorporated into the 1981 plan and essentially confirmed the 1971 exclusion for elementary students after the judge himself had traveled some of these lengthy routes. According to the Court, the distances and inconveniences produced by such long routes "defie[d] logic and create[d] an almost impossible barrier to liaison between parent and teacher." A. 113-14; Tr. of June 26, 1979, Hearing, Volume III, at p. 26-28.

a contempt of court order would violate due process. A. 56-57. Taken in context, therefore, the District Court's observation does not justify the Respondents' conclusion, *see*, Br. Opp. 23, that the School Board has within the past decade engaged in the type of unconstitutional conduct with system-wide impact that this Court found in *Columbus Board of Education* v. *Penick*, 443 U. S. 449, 454-63 (1979). Nor, given the absence of a finding that the School Board had violated the Constitution and the fact that the School Board's actions affected only one school, could a court have so characterized the School Board's actions.[2]

Finally, the Respondents note the Court of Appeals' statement that the school system has yet to achieve unitary status. As the *Spangler* Court emphasized, however, this fact alone does not permit a federal court "to rearrange its attendance zones . . . so as to ensure that the racial mix desired by the court was maintained in perpetuity," once "a racially neutral attendance pattern" has been implemented. 427 U. S. at 435-36.[3] The Sixth

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[2] The Respondents' reliance on the 1979 District Court statement was not shared by the Court of Appeals. That court did not purport to rely upon the School Board's conduct affecting one high school to justify its creation of a new plan for the entire school system. Presumably, the Sixth Circuit recognized that any problem existing in the administration of the optional transfer program had been cured by the 1981 plan and that, in any event, this issue could not justify its refusal to permit the 1981 plan constructed by the District Court to go into effect.

[3] In a footnote, the Court of Appeals also said that the failure to achieve unitary status was in large part because of "the Board's implementation of the 1971 plan." A. 11 n.5. The court may have been referring to the effects of the 1971 plan criticized by the District Court, *see*, pp. 2-3 *supra*. In any event, the suggestion that the School Board "implemented" the 1971 plan and that the plan has yet to achieve unitary status does not mean, as the Respondents suggest, that the School Board has committed continuing constitutional violations. A desegregation plan may be in place for some time before a federal court concludes that the effects of pre-plan constitutional violations have been fully vitiated. *See, Spangler* v. *Pasadena City Board of Education*, 611 F. 2d 1239 (9th Cir. 1979).

Circuit's order that the District Court redraw attendance zones to reflect the current racial makeup of the school system — which was not based on any finding that the School Board within the past decade had obstructed the system-wide implementation of the 1971 plan — directly conflicts with this Court's decision in *Spangler.*[4]

2. The Respondents argue that the Sixth Circuit "carefully and conscientiously" applied the dictates of *Swann* v. *Charlotte-Mecklenburg Board of Education* when it refused to allow the implementation of the 1981 plan. Br. Opp. 27. The Respondents have not challenged the fact that the "District Court's modification of the pupil assignment portion of the plan creates more integrated schools for secondary students" than continued use of the 1971 plan. Pet. 11. Both the Respondents and the Sixth Circuit believe that *Swann* bars a modification to a desegregation plan that increases integration merely because the plan is not explicitly designed to reflect within each school the racial balance of the school system. That is a sure sign that *Swann* is being seriously misread by litigants and courts alike.

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[4] The Respondents claim that the School Board has "erroneously ignored that '[e]ach instance of a failure or refusal to fulfill [its] affirmative duty continues the violation of the Fourteenth Amendment.' " Br. Opp. 24 n. 15, *quoting, Columbus Board of Education* v. *Penick,* 443 U.S. at 459. The School Board has ignored nothing — the quoted language from the *Columbus* case concerns a school board's affirmative duty to dismantle a segregated system before a court-ordered desegregation plan exists. Once a desegregation plan has been put into effect, the inquiry shifts to whether subsequent changes in the racial makeup of the school system were caused by the school board's actions. *Pasadena City Board of Education* v. *Spangler,* 427 U.S. at 435. Neither the District Court nor the Court of Appeals made findings of fact that would support the conclusion that the actions of the School Board in the last ten years have caused resegregation of the school system.

3. The Respondents also embrace the Sixth Circuit's mistaken interpretation of the *Swann* Court's approval of busing as a permissible remedy. Respondents themselves characterize the Court of Appeals as having instructed the District Court to order the busing of children in grades K-4 unless busing risks the health of the children or significantly affects the educational process. Br. Opp. 30-31. *Swann* recognizes that busing is permissible; it does not mandate the transportation of pupils. Pet. 14. The proper inquiry is whether a desegregation plan is effective, *see, Davis* v. *Board of School Commissioners of Mobile County*, 402 U.S. 33, 37 (1971), not — as the Sixth Circuit and respondents believe — merely whether it includes the busing of young school children. The Respondents' brief thus further demonstrates that this Court's *Swann* decision has been widely misunderstood.

4. The Respondents attempt to justify the Court of Appeals' "failure to address the issue of the effectiveness of the desegregation plan," A. 35 (Celebrezze, J., dissenting), by claiming that the district court committed legal error and ignored "undisputed findings of continuing constitutional violation." Br. Opp. 31. As we have demonstrated in our Petition for Certiorari and in this Reply, the District Court committed no legal error by refusing to adopt the Sixth Circuit's mistaken interpretation of *Swann* v. *Charlotte-Mecklenburg Board of Education*. As we have also explained, one will search in vain in either the District Court or the Court of Appeals opinions for the "undisputed" conclusion that the School Board has committed a continuing constitutional violation in the last decade. There is no difficulty in ascertaining, however, that the District Court explicitly applauded "[t]he good faith efforts of this [School] Board to achieve desegregation." A. 153. Quite simply, the Respondents have offered no legally sufficient ra-

tionale that supports the Court of Appeals' refusal to allow implementation of the District Court's 1981 plan.[1]

Respectfully submitted,

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[1] Although the Court of Appeals did not reverse the District Court's findings of fact as clearly erroneous, the Respondents challenge the District Court's finding — based upon the testimony of Respondents' own witness — that young school children would be best served by a lessened emphasis on busing and a greater emphasis on remedial and cultural education. Pet. 5-6. The Respondents base their contention upon "dispositive social science evidence" contained in an appendix to the opinion of the Court of Appeals. Br. Opp. 33 n. 20. This evidence was never introduced in the District Court and the School Board has never had an opportunity to cross-examine the authors of the study or to introduce evidence in rebuttal. We do not understand the Court of Appeals to have rejected the District Court's findings on the basis of information that was not part of the record. Rather, the Sixth Circuit, because of its mistaken understanding of the *Swann* decision, reversed the 1981 plan despite the District Court's findings of fact.

I hereby certify that a copy of the foregoing reply has been mailed this 10th day of November, 1982, to the following counsel:

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